# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1956

## No. 124

NATIONAL LEAD COMPANY, PETITIONER,

*vs.*

COMMISSIONER OF INTERNAL REVENUE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] [File Endorsement Omitted]

## THE TAX COURT OF THE UNITED STATES

NATIONAL LEAD COMPANY, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

AMENDMENT TO PETITION—Filed April 9, 1954

The petition is hereby amended by striking out the present paragraph (4)(e), appearing at pages 3 and 4, and inserting in lieu thereof the following:

* * * * * * *

"(f) The Commissioner erred in failing and refusing to determine that the petitioner is entitled, under section 23(t) of the Internal Revenue Code, to additional deductions from gross income, for the calendar year 1944, in the aggregate amount of $121,047.24, in respect of certain emergency facilities with respect to which certifi-
[fol. 2] cates had been duly made under section 124(f) of the Internal Revenue Code.

* * * * * * *

The petition is hereby further amended by striking out the present paragraph (5)(e), appearing at page 15, and inserting in lieu thereof the following:

* * * * * * *

[fol. 3] "(1) During or prior to the calendar year 1944, there were duly made and issued to the petitioner, under the authority of section 124 of the Internal Revenue Code, certificates, numbered N.C. 1893, N.C. 6298A-3, and N.C. 6298A-4, relating to certain emergency facilities.

"(2) Each of the aforesaid certificates purported
[fol. 4] to apply to percentages, less than 100%, of the cost of the facility or facilities to which the certificate related. In the case of certificate N.C. 1893,

said percentage was 50%; and in the case of certificates N.C. 6298A-3 and N.C. 6298A-4, said percentage was 35%.

"(3) The aggregate cost of the facility or facilities to which the aforesaid certificate N.C. 1893 related was $497,821.12; and the aggregate cost of the facilities to which the aforesaid certificates N.C. 6298A-3 and N.C. 6298A-4 related was $15,338.60 and $154,422.21, respectively.

"(4) For the calendar year 1944, the Commissioner treated as deductions allowable to the petitioner, under section 23(t) of the Internal Revenue Code, in respect of the facilities to which the aforesaid certificates related, the aggregate amount of $113,259.95, such amount being computed by restricting the application of said section 23(t) to the percentages of cost of said facilities to which said certificates purported to be limited.

"(5) For the calendar year 1944, the deductions allowable to the petitioner, under section 23(t) of the Internal Revenue Code, in respect of the facilities to which the aforesaid certificates related, aggregated $234,307.19, computed by applying said section 23(t) to the entire cost of said facilities.

* * * * * * *

[fols. 5-6] Karl Riemer, Lawrence S. Lesser, Pehle, Lesser, Mann, Riemer & Luxford, 1210 Eighteenth Street, N. W., Washington 6, D. C., Counsel for Petitioner.

[fol. 7] [File Endorsement Omitted]

THE TAX COURT OF THE UNITED STATES

[Title Omitted]

ANSWER TO AMENDMENT TO PETITION—Filed May 28, 1954

Comes now the respondent, by his attorney, DANIEL A. TAYLOR, Chief Counsel, Internal Revenue Service, and for answer to the amendment to petition heretofore filed in this proceeding denies as follows:

(4)(e) to (4)(h), inclusive. Denies that the respondent erred as alleged in subparagraphs (4)(e) to (4)(h), inclusive, of the amendment to petition.

(5)(e)(1) to (5)(h), inclusive. Denies the allegations contained in subparagraphs (5)(e)(1) to (5)(h), inclusive, of the amendment to petition.

Denies generally and specifically each and every allegation contained in the amendment to petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

Daniel A, Taylor, Chief Counsel, Internal Revenue Service.

Of Counsel: Arthur B. White, Regional Counsel; Harold D. Thomas, Assistant Regional Counsel; James E. Markham, Jr., Special Attorney, Internal Revenue Service.

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[fol. 8] THE TAX COURT OF THE UNITED STATES

[Title Omitted]

STIPULATION OF FACTS No. 6

With respect to the issue joined by the respondent's denial of the allegations of paragraphs (4)(f) and (5)(f) of the petition (as amended), it is hereby stipulated and agreed by and between the parties hereto through the

undersigned, their respective attorneys, that the following facts are true, and may be incorporated by the Court in its findings of fact, subject to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

[fol. 9] (1) The National Lead Company (herein sometimes called "National Lead"), the petitioner in this proceeding, is a corporation organized in 1891 and existing under the laws of the State of New Jersey. At all times material herein, National Lead has been one of the principal producers in the United States of alloys and mixed metal products suitable for use in the manufacture of industrial bearings, including bearings for railway car journals, for diesel and steam engines, and for other industrial purposes; and either directly or through the instrumentality of wholly—or majority-owned subsidiary corporations, has been engaged in the manufacture and sale of such bearings.

(2) For some years prior to 1944, the American Bearing Corporation (herein sometimes called "American Bearing"), a corporation organized in 1935 and existing under the laws of the State of Indiana, was engaged on its own account in the manufacture and sale of industrial bearings, especially precision bearings for diesel and steam engines, and in the production of certain machinery for its own use.

(3) On or about May 3, 1935, National Lead acquired, by purchase, 1,000 of the 1,700 authorized, issued, and outstanding shares of the $7 preferred stock of American Bearing; on or about December 22, 1936, National Lead acquired, by purchase, 320 additional shares of the $7 preferred stock of American Bearing; and on or about February 8, 1944, National Lead acquired, by purchase, the remaining 380 shares of the $7 preferred stock of American Bearing. On or about May 3, 1935, National [fol. 10] Lead acquired, by purchase, 600 of the 1,000 authorized, issued, and outstanding shares of common stock of American Bearing; and on or about February 8, 1944, National Lead acquired, by purchase, the remaining 400 shares of the common stock of American Bearing, thereby becoming the owner of all the authorized, issued, and outstanding stock of any class of American Bearing. On or about June 30, 1944, National Lead caused American Bear-

ing to be liquidated and dissolved, in a transaction qualifying as nontaxable under the provisions of section 112(b)(6) of the Internal Revenue Code. From and after June 30, 1944, the business previously conducted by American Bearing was conducted by National Lead, as a division, under the name of National Lead or under the name of "American Bearing Corporation".

(4) On February 1, 1944, American Bearing filed, with the War Production Board, an application for a certificate of necessity covering the cost of constructing, acquiring and installing certain facilities, including buildings and machine tools, for the purpose of producing bronze back, heavy wall bearings for heavy duty diesel and steam engines. On February 5, 1944, the War Production Board, pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-1893 in respect of the aforesaid facilities. A correct copy of said Necessity Certificate is attached hereto as Exhibit 6-A. As indicated thereon, said certificate purported to be limited to 50 per cent of the cost of the aforesaid facilities.

[fol. 11] (5) On June 27, 1944, American Bearing filed, with the War Production Board, an application for a certificate of necessity covering the cost of constructing, acquiring, and installing certain facilities, including buildings and furnaces, for the purpose of producing centrifugal cast bronze backs for diesel bearings. On June 30, 1944, the War Production Board, pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-6298 in respect of the aforesaid facilities. A correct copy of said Necessity Certificate is attached hereto as Exhibit 6-B. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(6) Pursuant to application filed by National Lead after June 30, 1944, the War Production Board, on September 26, 1944, and pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-6298-A-3, covering the cost of acquiring and installing certain additional facilities (machine tools) for the purpose of the project referred

to in paragraph (5). A copy of said Necessity Certificate is attached hereto as Exhibit 6-C. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(7) Pursuant to application filed by National Lead after June 30, 1944, the War Production Board, on November 2, 1944, and pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue [fol. 12] Necessity Certificate No. NC-6298-A-4, covering the cost of acquiring and installing certain additional facilities (furnaces) for the purpose of the project referred to in paragraph (5). A copy of said Necessity Certificate is attached hereto as Exhibit 6-D. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(8) American Bearing or National Lead, as the case may have been, duly proceeded to construct, reconstruct, erect, install, or acquire the facilities to which Exhibit 6-A related. The final cost of said facilities, as audited by the respondent, was $497,821.12.

(9) The petitioner concedes that it is not entitled to any deduction not previously allowed, and applicable to any period ending on or before June 30, 1944, in respect of the facilities covered by Exhibit 6-A.

(10) For the portion of the calendar year 1944 subsequent to June 30, the respondent failed and refused to allow to National Lead, as a deduction under section 23(t) of the Internal Revenue Code, in respect of the facilities covered by Exhibit 6-A, any amount in excess of an amount computed in accordance with the purported 50 per cent limitation appearing on the face of said Exhibit 6-A. Said amount so computed and allowed as a deduction was $92,215.89. If no such percentage limitation is applicable, the petitioner is entitled to a further deduction of $92,215.89 for the portion of the calendar year 1944 subsequent to June 30, which further deduction the re- [fol. 13] spondent has failed and refused to allow. The correctness of said failure and refusal is the issue to which this stipulation is addressed (see also paragraph (12)).

(11) National Lead duly proceeded to construct, reconstruct, erect, install, or acquire the facilities to which Ex-

hibits 6-B, 6-C, and 6-D related. The final cost of said facilities, in the aggregate and as audited by the respondent, was the sum of $183,296.81.

(12) For the portion of the calendar year 1944 subsequent to June 30, the respondent failed and refused to allow to National Lead, as a deduction under section 23(t) of the Internal Revenue Code, in respect of the facilities covered by Exhibits 6-B, 6-C, and 6-D, any amount in excess of an amount computed in accordance with the purported 35 per cent limitation appearing on the face of said Exhibits 6-B, 6-C, and 6-D. Said amount so computed and allowed as a deduction was $9,085.17. If no such percentage limitation is applicable, the petitioner is entitled to a further deduction of $16,872.46 for the portion of the calendar year 1944 subsequent to June 30, which the respondent has failed and refused to allow. The correctness of said failure and refusal is the issue to which this stipulation is addressed (see also paragraph (10)).

(13) If the percentage limitations referred to in paragraphs (10) and (12) above are not applicable, and the petitioner is entitled to the further deductions under section 23(t) of the Internal Revenue Code set forth in said [fol. 14] paragraphs, the petitioner concedes that its aggregate deduction for depreciation, under section 23(1) of the Internal Revenue Code, for the calendar year 1944, should be reduced by $12,033.07.

(14) Attached hereto as Exhibit 6-E is a correct copy of an excerpt from the record, in the United States Court of Claims, in the case of *Wickes Corp. v. United States* (108 Fed. Supp. 616), which excerpt sets forth the reasons for the percentage limitations appearing on the face of Exhibits 6-A, 6-B, 6-C, and 6-D.

(15) At the time of this hearing, it is impossible for the respondent and the petitioner to verify the precise dates of the beginning of construction, acquisition, or installation of the facilities referred to in this stipulation. The petitioner will submit information relating to said dates for verification by the respondent and submission to the Court.

(S) Karl Riemer, (S) Floyd F. Toomey, Attorneys for Petitioner. (S) Daniel A. Taylor, Attorney for Respondent.

(Here follow 2 Photolithographs, side folios 15, 16)

# Exhibit 6-A

8A

FORM GA-1239 (1-4-44)
R

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

## NECESSITY CERTIFICATE

DATE

SC 1897

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Avenue
Indianapolis, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of three pages ) are necessary in the interest of national defense during the emergency period, up to 50 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on February 1, 1944.

WAR PRODUCTION BOARD

By [signature]
Recording Secretary

FEB -5 1944

SIGNATURE

(1147)—War Board 0234—p. 1

# Exhibit 6-B

| FORM GA-1239 (2-4-44) R | UNITED STATES OF AMERICA WAR PRODUCTION BOARD | DATE | RE - 6298 |
|---|---|---|---|

## NECESSITY CERTIFICATE

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 So. Harding Street
Indianapolis 7, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 25 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on June 27, 1944.

WAR PRODUCTION BOARD

By [signature] Secretary

JUN 30 1944

(1944—War Board 1234—p 1

818

# Exhibit 6-C

| FORM GA-1239 (10-11-44) R | UNITED STATES OF AMERICA WAR PRODUCTION BOARD | Date | NC - |
|---|---|---|---|
| | NECESSITY CERTIFICATE | Sept. 26, 1944 | 6298-A-3 |

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Street
Indianapolis 7, Ind.

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages X X X

# Exhibit 6-D

| FORM GA-1239 (10-11-44) R | UNITED STATES OF AMERICA WAR PRODUCTION BOARD | DATE | NC - |
|---|---|---|---|
| | **NECESSITY CERTIFICATE** | | 6298-A-4 |

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

**American Bearing Corporation**
**429 S. Harding Street**
**Indianapolis, 7, Indiana**

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 25 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, to the extent that such construction, reconstruction, erection or installation is begun or such acquisition is effected within 60 days after the issuance date of this certificate.

WAR PRODUCTION BOARD
By _____
RECORDING SECRETARY

NOV 2 1944

B-43000

[Appendices describing facilities are omitted]

[fol. 17] Exhibit 6-E—Filed Dec 30 1946

AFFIDAVIT OF SIDNEY T. THOMAS, CHIEF, TAX AMORTIZATION BRANCH, CIVILIAN PRODUCTION ADMINISTRATION

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, SS:

I, Sidney T. Thomas, being duly sworn, do hereby depose and say:

1. I am the duly appointed Chief of the Tax Amortization Branch of the Civilian Production Administration and prior to that was Acting Chief of said branch of the War Production Board since December 26, 1943.

2. In that position, I have been delegated authority by the Chairman of the War Production Board and his successor the Administrator of the Civilian Production Administration,[1] to consider applications for Necessity Certificates and to issue Necessity Certificates or to disapprove of such applications, in accord- with the policies and regulations established by the Chairman of the War Production Board and the Administrator of the Civilian Production Administration under Section 124 of the Internal Revenue Code.

3. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

4. In order to give the necessary background of the tax amortization program, I quote from the Report of the then Under Secretary of War Robert P. Patterson to the [fol. 18] Secretary of War dated 10 March 1945, copy of which is attached marked Exhibit A. As stated by Under Secretary of War Patterson:

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies

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[1] The functions of the War Production Board were transferred to the Civilian Rroduction Administration by Executive Order 9638 dated October 4, 1945.

which could not be predicted with any certainty, industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition, there was every indication that Congress would provide a very high excess profits tax to [fol. 19] cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to include a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valueless. Some means had to be devised to allow the return of the cost of their expansion to the contractor while the expanded facilities were being used in war production.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of order within a year or two, private industry could not be expected to assume

all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940, (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was soon to be introduced, a provision for amortization over a five-year period of national defense.

5. The passage of Section 124 of the Internal Revenue Code and its subsequent amendments then followed.

6. Many of the procedures and policies followed by the War Production Board in administering Section 124 [fol. 20] were the necessary outgrowths of those established by the War and Navy Department during the primary administration of the law prior to December 17, 1943.

7. As required by the statute, the Secretaries of War and Navy issued from time to time regulations governing the issuance of Necessity Certificates. First, in time, was the regulation of May 22, 1942 approved by the President and later amended with the approval of the President on February 1, 1943. A copy of the regulation, as amended, is attached and marked Exhibit B.

8. During this period the purpose of the program was to get the plants built and devoted to war work in view of the great shortage of capital equipment to meet war needs. The guides to be followed in determining the issuance of Necessity Certificates included such factors as the type of supplies to be manufactured, the time of acquisition, whether in fact a definite shortage of capacity in plant existed, the purpose of the acquisition and related matters.

9. By the spring of 1943, as stated by the Under Secretary of War Patterson in his report:

It was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The search for maximum war production now required, not an encourage-

ment of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build pro- [fol. 21] duction to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

10. We were entering into a phase of total warfare under which materials and manpower were short and every facet of our economy was being affected. It would seem that no investment of capital should be made and no one should be allowed to use materials unless the facilities involved were clearly "necessary in the interest of national defense". If mass certifications were granted, the resultant loss of revenue to the Treasury would be appreciable. With increased tax rates, Necessity Certificates had become more attractive as a method of financing than they were when the statute was originally enacted. The cost to the Government of certified facilities was higher through a sacrifice in tax revenues. For these reasons, among others, the entire matter was re-examined with a view to determining whether the Act should be terminated so far as giving further amortization rights to any facilities or whether any investment of private capital should be entitled to emergency amortization.

11. On June 25, 1943, the matter was submitted to the Office of War Mobilization, with a suggestion of

[fol. 22] possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations governing the issuance of necessity certificates. It was suggested that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion.

12. Therefore, an amendment to the existing regulations was submitted to the President for approval. This amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824). A copy is attached and marked Exhibit C. Out of fairness to the applicant who had already spent his money or who had previously filed his application, the discontinuance was not to apply retroactively.

The amendment provided that a facility "shall not be deemed necessary" unless either Secretary, in exceptional cases, has determined prior to the beginning of construction or the date of acquisition that there is a shortage of facilities for a supply required for military or naval use and that it is to the advantage of the Government that additional facilities for such supply be privately financed. As has been indicated, the clear intention was to obtain substantial termination of the issuance of certificates. For that reason, the press release issued on the date when the President approved the regulations stated that the amendment "indicates virtual termination of the tax amortization privilege". (See NY Times, Oct. 10, 1943, Sec. 5, P. 59, Col. 1; NY Times, Dec. 19 1943, Sec. 5, P. 10S, Col. 5)

13. In addition to the extensive notoriety of the amendment given in the press of the country and its publication [fol. 23] in the Federal Register, a copy of this amendment was sent to all taxpayers, including the plaintiff United States Graphite Company, who had previously filed application for necessity certificates. Copy of this notice is attached and marked Exhibit D.

14. On December 17, 1943, the President, by Executive Order, (No. 9406, 8 F. R. 16955) transferred the function of issuing necessity certificates in all future cases from

the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file. The principle of predetermination and the principle of considering what was to the advantage of the Government as a financial matter were retained in the transfer. On the same date, the President approved the amended regulations governing the issuance of necessity certificates prescribed by the Chairman of the War Production Board. Copies of these regulations are attached hereto and marked Exhibit E.

15. The new regulations adopting the principles outlined in the regulations of the Secretaries of War and Navy recognized the complete tie-in between the actions taken in granting priorities or authorization to construct with respect to facilities and the financial matters to be decided with respect to the issuance of necessity certificates. Regulation (3)(c)(V) required that an application for necessity certificate be filed concurrently with the request for priority assistance or specific authorization.

16. With respect to future certifications, the Executive Order specified that necessity certificates should not be issued unless prior to the beginning of construction or date of acquisition, the Chairman of the War Production Board determined (1) that the facilities were clearly necessary [fol. 24] for the war effort, and (2) that it was to the advantage of the Government that the facilities be privately financed.

17. It should be noted in this connection that the granting of priorities called for different considerations and the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law (The Second War Power Act) and was administered under different Executive Orders No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). In point of fact, the preference ratings issued to United States Graphite Company in this case for this equipment were AA-3. There were several priorities higher than this that could have been granted.

18. There was a tremendous advantage to be gained by any private manufacturer who could build up a postwar plant at the expense of wartime income. A memorandum prepared by the Tax Amortization Branch of the War Production Board outlining the factors to be considered in predetermination, whether it was to the advantage of the Government that the facilities be privately financed, is attached and marked Exhibit F. The standards applied in the partial certification of facilities were these:

I. Postwar utility

A. Under War Production Board policy, facilities having presumptive postwar utility receive partial certification only. This policy arises out of section 3-b-2 of Executive Order 9406 which requires a finding: "that it is to the advantage of the Government that such additional facilities be privately financed." The section was designed to protect the financial interest of all of the [fol. 25] taxpayers in a certified facility. The Government, which represents all the taxpayers, may eventually pay as much as 85 per cent of the cost of a fully certified facility, whereas if the facility were Government owned, the Government would be able, by sale or other disposition after the war, to recoup a part of its cost. Thus, the facility would have been made available for the war effort at a probable saving as compared with full certification. The saving would result no matter who is able to use the facility after the war, so that postwar utility should not be considered as limited to utility in the hands of any particular applicant.

B. Postwar utility is not restricted to usefulness to the applicant himself in his regular business, as a facility is considered to have presumptive postwar utility if it may reasonably be considered useful to anyone after the war. For example, a "standard machine tool" is always considered to have postwar utility because it can be used to produce many items other than the subject war product for which the applicant needs it. On the other hand, a "special machine tool" which can be used only to make a specific war product having no civilian

use would be considered as having little or no presumptive postwar utility. Again, permanent structures, installations, and building additions are practically always to be considered as having presumptive postwar utility, while a strictly temporary structure of such construction that it could not be useful for many years might be considered to have little or no presumptive postwar utility.

II. Purpose of partial certification

Partial certification is intended to cover a liberal allowance for the excess cost of wartime acquisition or construction as compared with normal or prewar (1937-1939) costs.

[fol. 26] III. Standard 35 per cent partial certification

A. After surveys of current and prewar costs of many types of facilities, partial certification has been standardized at 35 per cent of current costs.

B. Departure from the standard 35 per cent partial certification for facilities having presumptive postwar utility would require definite evidence that 35 per cent does not cover the increase in current costs above prewar costs. For example, if it be established that a facility currently costing $100,000 could have been built in the period 1937-39 for $40,000, a recommendation of 60 per cent certification would be in order.

IV. Mixed percentage certification

There is no objection to recommending 100 per cent certification of certain facilities and denial or partial certification of certain other facilities covered by the same application, or a mixture of all three recommendations, as the facts may warrant. Such mixed percentage recommendations should clearly indicate which recommendation applies to each portion of the application, and the reasons therefor.

V. Recommendations

All recommendations should specify whether or not the facility is considered to have postwar utility. If special circumstances appear to warrant certification in excess

of the standard 35 per cent, the facts should be clearly stated to support an appropriate recommendation.

19. There is attached hereto a copy of the circular dated March 8, 1944 approved by J. A. Krug, then Vice Chairman of the War Production Board, setting forth criteria [fol. 27] for preparation of recommendations for necessity certificates. A copy is attached and marked Exhibit G.

20. Under the above established procedures, the application of the United States Graphite Company for a necessity certificate to amortize its machinery was considered. This application was filed on May 29, 1944 with the Tax Amortization Branch of the War Production Board. This application was considered independently of the issuance of a necessity certificate for the plant. The necessity for amortization of the machinery was determined upon the facts and circumstances then existing at the time of the application. The bulk of the machinery in question consisted of standard machine tools in general use in industry such as internal grinders, drill presses, surface grinders, hydraulic grinders, and related tools. It was our opinion that these items were likely to have a broad market and general value at the end of the war and be of use for normal peacetime production.

21. Applying the general principles and policies outlined in the regulations, we arrived at the determination that only 35 per cent of the cost of these items should be amortized during the emergency period. Accordingly, a necessity certificate was issued for the items acquired after the time of our determination, July 17, 1944, covering 35 per cent of the cost. Items acquired before that date were denied a necessity certificate for the reason that the application was not filed at the time required by the regulation.

22. The scope of this program is indicated by the fact that total dollar value of necessity certificates issued since the inception of the program in 1940 exceeds $6,700,000,000. Applications and certificates covered every phase of industry, manufacture, mining and transportation. Subse- [fol. 28] quent to the transfer of this program to the Chairman of the War Production Board on December 17, 1943, a total of 11,435 applications for necessity cer-

tificates were received and passed on by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were denied in total and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for necessity certificates during this period was $1,498,730,000. Of time amount, $70,-163,000 were approved and the total amount denied was $797,567,000.

23. Although accurate statistics are not available covering the exact percentages of such applications which were denied for various reasons, of the total amount of all certificates issued, a majority were granted for only a percentage of the amount applied for, varying in individual cases from 20 per cent to 80 per cent dependent upon the determination of what portion of the material applied for were attributable to expenditures necessary in the interests of national defense during the emergency period. A substantial portion of the applications were denied, in whole or in part, for the reasons that application was not made in a timely manner as provided by Executive Order No. 9406 of December 17, 1943 and the regulations of the War Production Board.

24. The administration of Section 124 involved difficult and intricate problems. As put by Under Secretary of War Patterson:

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action [fol. 29] under the law which might confer upon firms using it, advantages beyond those legitimate and necessary to the enlisting of their cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

25. The whole philosophy of the program was an attempt "to map a careful course which would secure haste

without waste". The determination of the application of the United States Graphite Company conformed to these principles.
Attachments.

Sidney T. Thomas.

Sworn and subscribed before me this 27th day of December, 1946.

Mary M. Repetti, Notary Public.

My commission expires Dec. 1, 1949.

[fol. 30] EXHIBIT A TO EXHIBIT 6-E—Filed Dec. 30, 1946

C. A. 36695

War Department

Office of the Under Secretary

Washington, D. C.

A Report to the Secretary of War on the Administration of Section 124 of the Internal Revenue Law Relating to the Issue of Necessity Certificates.

Introduction

Wars are often lost before the first shot is fired.

Fortunately enough Americans realized this back in 1940. Although the national peril was great, we were not at war. We were witnessing the tragic consequences of "too little and too late." Our Army was woefully small, and we were totally lacking in facilities capable of producing the vast quantities of munitions that would be required. Immediate action was needed to avert the fate of other unprepared nations.

Congress passed laws to get the men it knew we would need for our armed forces and to get the material with which to arm them. The Selective Training and Service Act was passed in September 1940 to get the men. The

Tax Amortization law was passed in October 1940 to help get the material.

Private industry was naturally reluctant to risk its funds in the creation of war facilities. The Tax Amortization law was designed by Congress to give industry protection against possible bankruptcy and to encourage it to use its capital in building war facilities. The [fol. 31] law did this by allowing a write-off of the cost of the facilities within a period of five years.

This measure enabled us as a Nation to rely upon private industry for part of the needed expansion. It gave us the opportunity to build with speed the necessary facilities, not only to defend our shores but to attack the enemy without let-up.

The attached report shows how the law, by no means perfect as it was first written, was amended to become more efficient step by step. It shows how the problems of administering it, unexpected in their extent and complexity, were tackled and solved. It outlines a few of these problems.

The need for huge quantities of tanks, planes and guns was evident at the start. But for tanks, we needed steel; for steel, we needed coke; for coke, we needed coal; for coal we needed transportation. New facilities were needed to produce an enormous variety of items needed for the war ranging from alpha protein to fish oils, from igloos to synthetic rubber, from V-mail to yeast. The total of facilities certified by the War Department had a value of almost five billion dollars.

Certification had to be speedy, but it also had to be carefully administered so that the Government's interest would be protected. Infinite care and careful attention to details were essential in meeting the many unprecedented situations which arose. The distinction between facilities necessary for defense purposes and those which were not, was often difficult to make. There was no doubt that a machine gun plant ought to be certified, and relatively little doubt that movie theatres and facilities for providing soft drinks, candies and pies for war workers ought not to be certified. But there were cases in between these extremes, such as facilities for housing,

[fol. 32] for banks and for servicing firms, where a correct decision as to the applicability of the law involved perplexities. Mistakes were doubtless made, but an important job was well done.

A pattern has here been written of how legislation designed to solve a technical and difficult problem can be put into action—perfected as it goes along—and, through intelligent administration, made to achieve notable success.

It is one chapter in the record of how this Nation, operating within a system of private enterprise which our enemies sneered at as stupid and inefficient, was able to arm itself with greater speed and thoroughness than any other Nation in history.

Robert P. Patterson, Under Secretary of War.

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War Department

Office of the Under Secretary

Washington, D. C.

February 15, 1945

A Report to the Secretary of War on the Administration of Section 124 of the Internal Revenue Law Relating to the Issue of Necessity Certificates.

## The Need for the Amortization Law

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, [fol. 33] industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was in-

creased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition to the difficulties already mentioned, prospective contractors also had to take into account the existence of a tax law designed to limit profits. This was the Vinson-Trammel Act which had originally limited profits on naval and aircraft construction to 12%, but which was amended, at exactly the moment when a great facilities expansion became necessary, to limit profits to 8%. In addition, there was every indication that Congress would provide a very high excess profits tax to cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough [fol. 34] surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to induce a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valuless. Some means had to be devised to allow the return to [of?] the cost of their expansion to the contractor while the expanded facilities were being used in war production.

The Treasury took the position that, under existing law, the depreciation period could not be accelerated.

It could give no assurance of a deduction for partial loss of useful value which, as soon as the emergency was over, would have allowed the writing down of the facilities to their post-war value. This inability to offer the contractor any assurance of special treatment of his war facilities for tax purposes made industry hesitate seriously about executing contracts for rearmament. The defense program was thus placed in serious jeopardy.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of orders within a year or two, private industry could not be expected to assume all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940 (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, [fol. 35] which was soon to be introduced, a provision for amortization over a five-year period of new facilities certified as necessary for the purpose of national defense. The announcement stated:

The contemplated action is expected not only to simplify the multiple tax problems of prospective contractors but to greatly clarify their future tax liabilities.

In this manner any doubts as to the tax position of contractors in the general program of national rearmament will be removed and they will be able quickly to execute defense contracts.

Legislative History—The Basic Law

World War I Law. There had been an amortization law for World War I but it was not considered a useful model. It had not been passed until three months after the Armistice; it provided for amortization on the basis of loss of useful value, an intangible factor which was to be determined by the courts. Consequently litigation had dragged on for years.

Basis for new law. In order to provide a law susceptible of exact calculation, it was decided that the new amortization provision should be based upon depreciation rather than loss of useful value. In other words, deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material continued. Because it was recognized that it was nearly impossible to determine in advance what facilities would be useful, and how far they would be useful, when war orders ceased, it was decided to permit the charging off of the entire cost, or a predetermined percentage thereof. Because it was also impossible to know in advance how long the facilities would be engaged on war [fol. 36] work, the tentative amortization period was fixed at five years, with provision for shortening the period and accelerating amortization correspondingly, with proper readjustment of the tax, if war orders did not require the use of the facilities for the full period of five years.

In order to provide a law susceptible of speedy administration, it was concluded that decisions as to necessity should be made not by the courts but by the procuring agencies, which could be expected to know best whether a particular expansion was necessary to national defense.

Introduction of bill. Provisions for amortization were incorporated in the bill, H.R. 10413, together with provisions for imposing an excess profits tax and for suspending the profit-limiting provisions of the Vinson-Trammel Act during the period in which the excess profits tax was in effect.

The Assistant Secretary of the Treasury, in explaining the bill, stated that the existing provisions for depreciation were designed to allow the cost of facilities as deductions from income during the years in which the asset contributed to income, but he recognized the inadequacy of these existing provisions when applied to facilities for the defense program.

Following the joint hearings of the Ways and Means Committee and the Senate Finance Committee, which consumed five days, H.R. 10413 was introduced in the House on August 27, 1940 and was passed without amendment on August 29.

Conditions in granting of amortization—Subsection (1). Objection was raised in the Senate to three subsections of the amortization provisions of the bill passed by the House. These subsections, (l), (j), and (k) incorporated [fol. 37] a policy designed to insure the continued existence of the amortized facilities for possible further use in national defense. To provide for this it was stipulated, under penalty of an increased tax liability, that the facilities for which amortization deductions were taken were not to be destroyed or substantially altered without the consent in writing of the Secretary of War or the Secretary of the Navy. If consent was refused the Government was obligated to purchase the facilities at a price not in excess of the adjusted base nor less than one dollar, with provision for repurchase by the taxpayer under certain circumstances.

The Advisory Commission to the Council of National Defense asked for the elimination of these three subsections. The Commission expressed full approval of their purpose but believed the objective could best be accomplished through contract provisions. In this connection the Advisory Commission outlined a contracting policy which it believed would adequately protect the interest of the Government in facilities which were accorded amortization.

The Finance Committee, after concluding its hearings, reported the bill back to the Senate with amendments. The principal amendment was a substitute subsection (i) to take the place of subsections (i), (j), and (k). The new subsection (i) required, in the alternative, either "non-reimbursement" or "government protection" as a condition to amortization. The Senate passed the bill as thus modified, and in conference the substitute subsection (i) was agreed upon.

Certificates Contemplated by Act. The Act, was finally approved on October 8, 1940 (Public Law 801, 76th Congress; Section 124 Internal Revenue Code) provided as follows:

[fol. 38] Necessity Certificate. For facilities acquired

or constructed after June 10, 1940*, which the Advisory Commission and either the Secretary of War or the Secretary of the Navy by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20% of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

Certificates of Non-Reimbursement and Government Protection: By the terms of subsection (i), the amortization deduction was allowed only upon condition that the contract offered no direct or indirect reimbursement in excess of normal exhaustion, wear and tear, unless the contract which afforded such reimbursement also contained terms which adequately protected the interest of the United States Government in the future use and disposition of the facility. The fact that no reimbursement had been offered in a particular contract could be established, with respect to any given contract, by a Certificate of Non-Reimbursement issued jointly by the Advisory Commission and either the War or Navy Departments. The fact that the contract adequately protected the interests of the government could be established by a Certificate of Government Protection, similarly issued.

Non-Necessity Certificate. If before the expiration of the five-year period the Secretary of War or the Secretary of the Navy certified by issuance of a "Non-Necessity Certificate" that particular facilities had ceased to be nec- [fol. 39] essary, provision was made, at the taxpayer's option, to recompute the amortization deduction so as to provide full amortization over the shortened period. A similar privilege was given, without issuance of a certificate, to all owners of certified facilities if the Pres-

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* This date was agreed upon in conference, it being the date upon which the House Ways and Means Committee reported its intention to consider an amortization Act. It was thought that a decision to build or acquire facilities after that date might be assumed to have been made with a promise of amortization. The original draft had fixed upon the date of the White House release, July 10, 1940.

ident proclaimed that a substantial portion of the certified facilities had ceased to be necessary. Taxes were to be recomputed in accordance with the recomputed amortization.

Payment Certificate. The Act also provided for certification by the Secretary of War or the Secretary of the Navy of the fact of payment in cases where a payment was made for unamortized costs because the contract involving the use of the facilities had been terminated by its terms or by cancellation, or in cases where a contemplated contract involving the use of the facilities was not granted. In such cases amortization was to be accelerated, at the election of the taxpayer, by permitting a larger deduction for the year of the payment.

## Amendments of the Law

Filing Date. As passed on October 8, 1940, the amortization law provided that Necessity Certificates should not be issued unless issued before the beginning of the construction or the date of acquisition; except that in the case of facilities already started or acquired when the law was passed, the certificate had to be issued before February 6, 1941. This time limit for the issuance of a certificate, regardless of the time of filing the application, afforded no opportunity for investigation and made the statute impossible to administer. As the February 6 deadline approached, the necessity for legislative change became obvious. The matter was laid before Congress, and on January 31, 1941, Public Law No. 3, 77th Congress, (H.J.Res. 80) was passed amending the law so [fol. 40] as to eliminate the fixed date and provide instead that an application for a necessity certificate must be filed within 60 days of the beginning of construction or of the date of acquisition or before February 6, 1941.

Although this provided ample time for the proper consideration of cases, it was found by late spring that the continually growing demand for war material caused such frequent changes in plans for facilities that the time limit of 60 days for the filing of applications was unsatisfactory. The War and Navy Departments accordingly

proposed to Congress on July 30, 1941 that the law be amended to extend to six months the period in which applications must be filed. This, it was hoped, would make it possible to gather in one application proposals which had previously appeared in two or more. The amendment, together with others described below were passed by Congress. The President gave his approval to it as Public Law 285, 77th Congress (H.J.Res 235) on October 30, 1941.

Joint Certification. The requirement of joint certification by two governmental authorities had all the disadvantages of divided responsibility. Administrative history in the past had often proved the unwisdom of such an arrangement; experience with the Amortization Law proved it once more. While the War and Navy Departments had agreed with the Advisory Commission of the Council of National Defense on instructions for the preparation of applications early in November of 1940, agreement on general principles for deciding cases was not achieved. Particular difficulty was encountered with respect to Certificates of Non-Reimbursement and Government Protection. Every attempt was made on both sides to be judicial, but agreement was not achieved. Since there was no machinery for appeal, deadlocks were inevitable and delays in administration became sufficiently [fol. 41-42] serious to give contractors just cause for concern. A change in the law was necessary. The Armed Services urged that they be relieved of responsibility or given sole responsibility. By the fall of 1941, the Advisory Commission had practically no active functions other than that of certifying orders under the Amortization Law. The Armed Services, being the procuring agencies, were in the best position to decide the facility needs of their procurement programs. Once convinced that joint certification was a failure, Congress had little hesitation in terminating the Advisory Commission's certifying authority. This was done on October 30, 1941. From then on, War Department cases were decided by the War Department alone and Navy cases decided by the Navy alone. In due course of time, both agencies came to lean

heavily upon the able assistance of the War Production Board in matters involving civilian supply.

Non-Reimbursement and Government Protection. Because sub-section (i) of the basic law required certification that there had been no reimbursement or in the alternative that there had been government protection; every contract, even those for small amounts of standard supplies, had to be examined. In the absence of either a Certificate of Non-Reimbursement or a Certificate of Government Protection, no assurance could be given the contractor that he would be entitled to amortization under his Necessity Certificate.

Determination of whether or not the price included reimbursement for more than normal depreciation proved almost impossible of attainment.

It was also difficult to establish standards for protection of the government's interest in amortizable facilities. An attempt was made to arrive at a uniform contract pro- [fol. 43] vision to be inserted in all supply contracts involving additional facilities, which would adequately protect the interest of the United States in the future use of disposition of the facilities and would legally warrant the issuance of a Certificate of Government Protection. However, the Attorney General gave his approval only to provisions which proved unworkable from a practical standpoint.

Some relief was secured by the October 30, 1941 amendment to the law (Public Law 285) whereby contracts under $15,000 and contracts for non-defense supplies were excluded from examination for reimbursement of facility costs. But there still remained the apparently insuperable difficulty of deciding whether the unit price in the numerous larger contracts included an amount in excess of normal depreciation. The amortization law was intended to overcome the hesitancy of contractors to invest private funds in needed facilities. To do this effectively the necessary certificates had to be issued at approximately the time of contracting for the facilities. By the end of 1941 Necessity Certificates had been issued by the War Department on $1,210,700,000 of facilities but the record on Certificates on Non-Reimbursement and on

Government Protection was unsatisfactory. 13,120 applications had been made to the War Department for certificates of Non-Reimbursement, only 278 had been issued. 219 applications had been received for Certificate of Government Protection; only 30 had been issued. Delay was causing considerable doubt about the amortization allowance. Hesitancy on the part of prospective contractors continued.

This was the situation when the United States was attacked by Japan. In spite of the gathering danger, the flow of private capital into plant expansions had not been rapid. And although a vast amount of Government financing had been provided, the tremendous [fol. 44] demands which the coming war set up made it highly desirable to afford private capital an adequate opportunity to serve.

On December 17, 1941, the War and Navy Departments proposed to Congress the repeal of subsection (i) as of the date of its passage. They took the position that the protection of the interest of the Government could be assured by a sound contracting policy at the time the contract was agreed upon. By that time the War Department had gained a great deal of experience with the problems involved in contracting for supplies requiring new or additional facilities. In view of the grave situation created by the outbreak of war, and the urgent need for making the greatest practicable use of private financing, it seemed only reasonable to rely upon this experience, rather than rigid rules, in administering the Amortization Act.

On February 5, 1942, H. J. Res. 257 (Public Law 436) which repealed subsection (i) as of the date of its passage was approved. With its passage the major obstacle in administering the Amortization Act was removed.

Further Amendments.

Under the original act only corporations were allowed amortization deductions. Although never clearly stated, it was understood that this limitation sprang from the fact that only corporations were liable to the excess profits tax. From time to time the question was raised whether individuals or partnerships, operating as such ought not to be included. As a consequence, in the Revenue Act of

1942, the Treasury Department suggested the extension of amortization to individuals and partnerships and the law was so amended by Public Law No. 753, 79th Congress. This same Act also permitted, for the first time, amortiza-
[fol. 45] tion of facilities acquired prior to June 10, 1940, the earliest permissible date of acquisition being extended back to January 1, 1940. The War Department neither offered nor expressly favored these amendments.

## Administration By The War Department

**Delegation to Under Secretary.** On October 15, 1940, one week after the passage of the Amortization Law, the Secretary of War delegated to the then Assistant Secretary of War (later Under Secretary of War) the duty of considering and acting upon the certificates which the Act required the Secretary of War to issue.

**Organization of Tax Amortization Unit.** A unit was established in the Office of the Assistant Secretary of War to administer the Act and to advise the Assistant Secretary as to the action to be taken upon applications. It was not formalized until Mr. Samuel Duryee became its Chief in December 1940. Lt. Colonel (now Brig. General) Edward S. Greenbaum took over as acting Chief in March 1941 and carried that responsibility along with his other duties until January 1942. Lt. Colonel (now Colonel) George H. Foster then became Chief and held that position until the work was completed in 1944. The entire staff including military and civilian personnel was never more than 80 persons at any one time. Although this unit with its personnel and records has been transferred to different Divisions of the War Department, it has continued since since its inception to administer the law under, and has remained responsible to the Under Secretary. All policy matters were settled in consultation with him and each certificate granted or denied received his approval.

**Appointment of Advisory Board.** In April, 1941, the Un-
[fol. 46] der Secretary appointed an advisory board, composed of men prominent in civil life, to examine applications for amortization with particular reference to the issuance of Certificates of Non-Reimbursement. These men gave generously of their time and experience and

greatly aided the War Department in its effort to solve these difficult problems. The Board was composed of:

James P. Baxter, 3rd, President, Williams College, Massachusetts
Samuel S. Duryee, Attorney, New York City
W. Tudor Gardiner, Former Governor of Maine
Garrard Glenn, Professor of Law, University of Virginia
James Hall, C. P. A., New York City
F. H. Hurdman, C. P. A., New York City
Bernard Knollenberg, Librarian, Yale University, Connecticut
James M. Landis, Dean, Harvard Law School
Harold F. Linder, Retired, New York City
William L. Marbury, Lawyer, Baltimore, Maryland
Abbot P. Mills, Attorney, Washington, D. C.
Dave H. Morris, Jr., Banker, New York City
Charles H. Murchison, Attorney, Jacksonville, Florida
George S. Olive, C. P. A., Indianapolis, Indiana
Frederick F. Umhey, Executive Secretary International Ladies Garment Workers Union, New York City

(David Dubinsky, President of the International Ladies [fol. 47] Garment Workers Union, was originally appointed, but at his request Mr. Umhey was appointed in his place.)

With the repeal of the non-reimbursement and government protection provisions of the law, the principal duties of the Board ceased. However, the aid of individual members was from time to time obtained in deciding the more difficult questions relating to necessity certificate applications. In the Spring of 1942, a working committee of three was formed, composed of Mr. Hall, Mr. Umhey and Professor Glenn (who was later forced to withdraw because of ill health). They made regular trips to Washington in order to advise on policies or specific cases and preside over hearings with applicants. Their work was of material assistance to the War Department.

Regulations. War Department interpretation of the law was based upon Regulations governing the issuance of Necessity Certificates, drawn up by a three-man Com-

mittee consisting of representatives of the War Department, Navy and War Production Board, and approved by the President May 22, 1942.

The regulations set no hard and fast rules except as to purely procedural matters such as timeliness of filing. The guides to be followed in determining necessity were quite simple and can be briefly summarized as follows. The necessity of a facility was to be determined in accordance with whether the supply it produced was required in the interest of national defense. A supply might be so required if essential to the armed forces, to any foreign nation furnished supplies under an act of Congress, or, under certain circumstances, even if it had only civilian use. Shortage of capacity in the industry must ordinarily be shown in order to justify an expansion. [fol. 48] Shortage of Capacity. The basic reason for insisting on a showing of shortage of capacity, rather than to increase the capacity of a particular company to meet its contract requirements, was the desire to spread contracts more evenly among all portions of an industry capable of producing the required items. Although generally successful in helping to spread the work, this policy necessarily required the denial of applications in cases where other companies possessed idle facilities capable of producing the needed items. When, at a later date, war production had to be doubled and trebled, the resulting shortage in capacity compelled the reconsideration of these original denials.

Types of Supplies. In the beginning it was evident that tanks, planes, guns, and ships would be demanded in quantities far beyond the existing fabricating capacity of the country. Shortly it became apparent that additional basic steel capacity was necessary. This in turn required more coke ovens for coke, more coal for coke, more iron ore, hence more mining facilities, and more transportation facilities to move the ore, coal, coke, and steel to places of usefulness. Workmen had to be transported to and from work, or housed at places of employment. Applications for the certification of transportation facilities and war housing were presented for decision. At many plants the rapid expansion of personnel led to the in-

auguration of "in-plant feeding." This brought applications for cafeteria facilities in the plants. A few of the items which were at one time or another determined to be necessary on the particular facts of the case, picked entirely at random, may be listed to give some idea of their great variety:

alpha protein, aircraft antenna, anti-toxins, arsenicals, balloon barrage wiring, balloon cloth, blitz cans, box shook, [fol. 49] commercial alcohol, cotton duck, cord, cuspidors, dehydrated foods, dyes, ether, felt, fire extinguishers, fish oils, glue, gun butts, gun stocks, hard chrome plating, igloos, insulation materials, jeans, jungle boots, lenses, life preservers, lime, nicotinic acid, parachutes, paulins, pliers, plywood, pigments, ponderosa pine, poplins, prisms, remote control systems, resin coated raincoats, safety belts, shearlings, slide rules, soluble coffee, steel casings, steel tubing, sulpha drugs, surgical dressings, synthetic rubber, synthetic sapphire, tallow, tin plating, tuads, V-mail, water purification machines, webbing, wire cutters, wrenches, and yeast.

Other Factors. In addition to the specific legal and administrative problems governing amortization, it was necessary to take into account broad problems of contract distribution, priorities, price control, and many other factors affecting the transfer from a peace to a war economy. In determining the need for facilities it was necessary, not only to consider contract commitments and future demands related thereto, but to place the request for certification in its proper place in the over-all picture of expansion, priorities, contract distribution, and other problems and policies. When a decision on a particular case was finally made, it represented an investigation of the industrial consequences which might spring from it. As the country approached an all-out war effort it became more and more difficult to decide where to draw the line. Although some general trends of procedure might be traced, the policy was predominantly one of judging each case on its merits.

Relation to National Defense. Certain facilities were obviously too far removed from the war to be certifiable. New construction of an office building in a large

city was denied even though there was indication that its construction would ultimately be of indirect bene- [fol. 50] fit to the defense program. And even though the Office of the Petroleum Co-ordinator requested wholesale conversion of oil burners to coal burners, such conversion was not certified where the applicant's product was not necessary. Applications related to such services as engineering were denied (the product of engineering firms being denominated as intellectual rather than physical) as were those related to retail distribution.

Time of Expansion. The decision as to necessity was made as of the time of expansion or later certification. In some cases the application was not received until after the facility was no longer necessary. Certain expansions of the natural rubber fabricating industry, of tin fabrication and of toluene processing (to use South American oil) were started and thereafter proved ineffective due to the situation arising after Pearl Harbor. However, amortization was granted because the facilities had been necessary when constructed.

Items Unnecessary for Defense Purposes. On occasion, an applicant was allowed certification of a larger facility than it actually needed if there was convincing evidence that no smaller facility was available. A company purchased "the only location we could get" which was "probably a third more than our requirements." Certification was granted on evidence that the useful part of the land was necessary and none other available. But where shortage of building space resulted from the fact that the applicant was building for permanence with comparative luxury, certification of a new building was denied. For the War Department was careful not to certify facilities which were in the luxury class. Plants to produce soft drinks and pies in this country were denied, as were bottled drink and [fol. 51] candy trucks and vending machines. Certification was denied for electric signs, glass desk tops, fish ponds, ping pong tables, pool tables and soda fountains. A flag pole was considered certifiable. Expensive carpets were denied. (But where the applicant's business involved use of diamonds, often dropped on the floor, a carpet was certified.) Air conditioning was ordinarily

denied as a luxury; certified where necessary for precision work or for other extraordinary reasons. While facilities for employees were in general allowed, the expansion of a bank to accommodate defense workers and soldiers was denied, as was a shopping unit to be built in connection with a housing project consisting of a restaurant, recreation building, doctors' and dentists' offices, movie theatre, drug store, etc. Couches were on occasion denied, yet where a shift was made from male to female labor and heat prostration was a frequent occurrence in a plant, they were obviously necessary and they were certified.

Costs: Derivation of Funds: Reconversion. The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price or cheapest type of construction. Nor was inquiry made of the source of the funds from which the purchase was made. A new plant was about to be constructed following condemnation of an older plant; presumably it was financed with funds received from the condemnation; the application was certified. The cost of conversion from peacetime to war use was certified, but no certificate granted for an allowance in order to reconvert to peacetime use after the war.

Acquisition of Leased Property. Many applications were received for purchase of formerly leased property. In these cases, careful inquiry was made as to [fol. 52] whether the purchase was actually necessary or whether it was feasible for the applicant to continue to lease; if the latter was the case, certification was refused.

Acquisition from Related Persons. Purchase of facilities from related persons were not ordinarily certified. Applications were denied involving purchase of land from the president of the applicant corporation or from his father, or from companies having substantial interlocking stock interests. However, the cost of transporting facilities from the plant of one related person to another was certified.

Second-hand Facilities. Care was also taken in screening applications for purchases of second-hand facilities.

Used freight cars sold by one railroad to another were on occasion denied as were purchases of used locomotives, ships and barges. Such transfers did nothing to increase over-all transportation facilities. On the other hand, where barges were bought second-hand for $59,000, the cost of reconditioning was $400,000 and the barges had been idle for a year due to the completion of a bridge which rendered unnecessary their former use as ferries, the purchase price and reconditioning cost were certified. A similar rule was applied to already existing plants or buildings, although in such cases it was ordinarily easier to prove the transfer was necessary. Thus, while acquisition of an existing grain storage elevator was denied certification, the acquisition of a textile factory which was going to be junked, was certified. Purchase of a brewery to be used for dried egg production (urgently required by Lend-Lease) was certified: such conversions from normal use to war use were, indeed common—from production of permanent waving machines to aircraft instruments, from soda fountain equipment to machine guns, from pants press-[fol. 53] ing to 20 mm. shot, from coffins to shells. With second-hand equipment such as tools, or materials, it was not ordinarily feasible to inquire as to previous use, and certification was made where the acquisition was necessary. Inquiry, in fact, had revealed on occasion a decided increase in usefulness; an example was use by an ordnance manufacturer of steel acquired from a World's Fair Building.

Defense Plant Corporation Facilities. The Defense Plant Corporation had been organized by the Reconstruction Finance Corporation to finance war facilities which were to be privately operated but government-owned (owned by the Defense Plant Corporation) and leased to the operator. In certain cases the operator desired to purchase the facility from the Defense Plant Corporation. Such acquisition would not have increased over-all productive capacity but it would have encouraged use of private capital in war industry. The conclusion was reached that, in general, acquisitions from the Defense Plant Corporation were not within the scope of the Amortization Law and applications for their certification were denied.

Motive. The applicant's motive in making the expansion was not inquired into. A tramway installed in a coal mine was certified on evidence that it increased production despite an indication that the applicant's motive was to save money in disposing of waste material. Similarly, an addition to power plant facilities apparently made to save costs was certified on evidence that the addition saved fuel. The original use of the facility, however, was considered important. In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted. Later, the owner (without additional expense) converted the remaining 70% of its plant to war work and requested 100% certi-[fol. 54] fication. The request was denied. In a somewhat similar case, a plant was erected to produce an unnecessary product (91 octane gasoline) in 1940. Two years later, the applicant erected additional facilities which, when combined with the 1940 facilities would produce a necessary product (100 octane gasoline). Certification was limited to the 1942 facilities. In yet another case, the applicant started to build a factory for production of electric sirens. Before construction was completed, the applicant was advised that electric sirens were not necessary. It accordingly completed its building to produce certain Ordnance supplies (which were necessary). The entire construction was certified.

## Efforts to Limit Amortization

By the spring of 1943 it was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The use of steel and manpower to create factories, which could not then be fully used because of a lack of materials and workers, would do injury to the war effort. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools

and the capital equipment it needs to build production to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as [fol. 55] much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

Another factor also suggested the need for a reconsideration of the amortization problem. The broad language of the act did not limit amortization to facilities for producing supplies for direct military or naval use. An increasing number of applications came in for certification of facilities in fields not under the control of the War and Navy Departments. Facilities needed in connection with transportation, the processing of food, and the production of raw materials were all deemed necessary by the agencies charged with coordinating these activities. During the period when facilities for direct military and naval supplies constituted the bulk of the expansion program, and other facilities were of minor significance, certification of cases of the latter type had been made by the War and Navy Departments upon the recommendation of the other agencies. However, in view of the fact that the War and Navy Departments were usually not directly conversant with the needs of the particular cases, it was thought that, if these cases were going to increase, certification ought to be by some other agency better able to judge their merits.

On June 25, 1943 the matter was submitted to the Office of War Mobilization, with a suggestion of possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments [fol. 56] to amend the regulations governing the issuance of Necessity Certificates so as to provide that certification

should be discontinued. He did suggest, however, that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion. A survey among the supply services of the War Department had revealed that in some programs further expansion was required.

Therefore, an amendment to the existing regulations was submitted to the President for approval. This provided that with the exception of facilities contracted for before the date of the amendment, no facility could be considered for certification unless the certificate was issued before the expansion started. It also provided that further certification under this restriction should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization. Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and were not available from Government-owned facilities, and the private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for Government financing. A few cases, it was recognized, might still arise which ought to be handled by amortization, but they would be limited to exceptional situations.

The amendment was approved by the President on October 5, 1943. Subsequently, notwithstanding the amendment, the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense. [fol. 57] The Office of Defense Transportation, in particular, had urged that transportation facilities be expanded to relieve the tight situation created by increasingly heavy shipments to the West Coast. On November 1, 1943, the War Department called this situation to the attention of the Office of War Mobilization with the suggestion that if certification was to be made in such cases, it should be done by the War Production Board. Thus, the question of amortization could be settled by the same agency which authorized the use of materials for the contemplated expansion. On December 17, 1943, the President, by Executive

Order, transferred the function of issuing Necessity Certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file.

Non-Necessity and Payment Certificates. By Executive Order No. 9486 of September 30, 1944, the power and the responsibility of the War Department in the issuance of Non-Necessity Certificates was transferred to the Chairman of the War Production Board, to be exercised by him in connection with his responsibility for guiding reconversion from war to peace-time production. By Executive Order No. 9490 of October 20, 1944, all the remaining functions of the War Department in connection with certification under Section 124 were likewise transferred to the Chairman of the War Production Board. This latter order covered amendments of Necessity Certificates already issued and Payment Certificates under subsection (h). Since the War Department had never issued a Non-Necessity Certificate under subsection (d), and had issued only three Payment Certificates under subsection (h). Execu- [fol. 58] tive Order No. 9490 in effect transferred a function which had never been exercised.

## Statistical Summary

In the period between the passage of the Tax Amortization Act and the transfer of the certification authority to the War Production Board, 31,047 applications for Necessity Certificates were filed for consideration by the War Department. From among that number the War Department issued 26,775 certificates covering the whole or part of the application. The remaining 4,272 cases were denied, withdrawn, or otherwise disposed of. The total dollar value of the facilities certified, on the basis of their estimated worth on the date of application, was $4,955,813,760.16.

A break-down of the figures is provided in the table which follows. It should be noted that the total in this table is three hundred million less than that cited above. The difference arises from the fact that the table is taken from the statistics compiled, first by the Advisory Commission,

and later by the statistical sections of the War Production Board after the Advisory Commission ceased to be a joint certifying authority in October 1941. In this compilation, after April 1943, all facilities of less than $25,000 in value in any one plant were excluded. The War Department figures includes them.

[fol. 59]

| Type of Product | Estimated Cost | Percentage |
|---|---|---|
| Manufacturing | | |
| Aircraft, Engines, Parts & Access. | $ 365,731,000 | 7.93 |
| Ship Construction & Repair | 12,234,000 | 0.27 |
| Combat & Other Motorized Vehicles | 100,547,000 | 2.18 |
| Guns | 95,846,000 | 2.08 |
| Ammunition, Shells & Bombs | 135,372,000 | 2.93 |
| Explosives & Ammunition Loading | 13,025,000 | 0.28 |
| Iron & Steel | | |
| Basic | 270,062,000 | 5.85 |
| Fabricated | 82,009,000 | 1.78 |
| Nonferrous Metals & Their Products | | |
| Aluminum & Magnesium | 306,462,000 | 6.64 |
| Other | 56,265,000 | 1.22 |
| Mach. Tools & Other Metal Work. Equip. | 158,603,000 | 3.44 |
| Machinery and Elec. Equip. & Appl. | 213,273,000 | 4.62 |
| Chemicals | | |
| Synthetic Rubber | 40,440,000 | 0.88 |
| Other | 288,405,000 | 6.25 |
| Coal and Petroleum Products | | |
| Aviation Gasoline | 437,727,000 | 9.49 |
| Other | 100,863,000 | 2.19 |
| Food Processing | 35,373,000 | 0.77 |
| Miscellaneous | 319,777,000 | 6.93 |
| TOTAL MANUFACTURING | $3,032,014,000 | |
| Mining and Industrial Service | | |
| Mining | 82,318,000 | 1.78 |
| Gas, Light, Heat and Power | | |
| Electric Power Generation | 123,837,000 | 2.68 |
| Electric Power Transmission | 109,032,000 | 2.36 |
| Gas Manufacture and Transmission | 48,499,000 | 1.05 |
| Steam, Heat and Power | 6,404,000 | 0.14 |
| TOTAL MINING | $ 370,090,000 | |
| Transportation and Related Service | | |
| Rail | 1,066,868,000 | 23.13 |
| Pipe-line | 17,654,000 | 0.38 |
| Motor, Air and Water | 84,489,000 | 1.83 |
| Terminal Facilities | 2,371,000 | 0.05 |
| TOTAL TRANSPORTATION | $1,171,382,000 | |
| Communication | 6,419,000 | 0.14 |
| Non-Industrial Service | 32,931,000 | 0.71 |
| GRAND TOTAL | $4,612,836,000 | |

After the transfer of the certification authority to the War Production Board, the War Department's action upon new applications was limited to making recommendations at the request of the War Production Board when it was claimed that the facilities were necessary for military supply. The fact that relatively few cases came up in which the need for additional privately financed facilities [fol. 60] for military supply was established confirmed the War Department in its belief that the need for amortization as an inducement to the private financing of such facilities had come practically to an end. The War Department disposed of its backlog of about five thousand applications filed prior to the transfer of the certification authority by July 19, 1944.

## Conclusion

The history of the Tax Amortization Law, and of its administration by the War Department, are topics full of technical and difficult detail. Yet, behind these complexities, lay the stark necessities of national defense in one of the greatest emergencies of our history. We either had to build an unparalleled munitions industry within the space of a few months or face disaster. We had to do so within the framework of the system of private enterprise, not only because that was the system in which we believed, but also because it was the system we had, and any attempt to change it suddenly would have brought dangerous confusion and delay.

This could not be achieved, however, merely by broad declarations of principle. Appeals to patriotism alone could not relieve the individual manufacturer of the necessity for remaining solvent. He could be asked to undertake the rapid expansion which national defense required for an activity of uncertain duration, only if he were given reasonable protection against bankruptcy at the end of the effort. The Tax Amortization Law was designed to provide that protection.

But the mere passage of the law did not remove the difficulty. Under any circumstances difficult problems of administering it would have arisen, problems which, unless solved, could largely destroy its intended effect.

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the [fol. 61] manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action under the law which might confer upon firms using it advantages beyond those legitimate and necessary to the enlisting of the cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

The problem of the administration of the law was, therefore, an unusually thorny one. It was necessary to map a careful course which would secure haste without waste. Little help could be gained from precedent of past experience. Many difficulties were encountered. Not all of them were solved satisfactorily; perhaps some of them never could have been. Nevertheless, we got the plants, which in turn produced the guns, tanks, and planes. It is a reasonable conclusion that, without the Tax Amortization Law the construction of our munitions industry would have been seriously retarded. Had that occurred, our position today might have been very different from what it is.

Robert P. Paterson, Under Secretary of War.

Filed Dec. 30 1946

[fol. 62] Exhibit F to Exhibit 6-E

Filed Dec 30 1946

WAR PRODUCTION BOARD
WASHINGTON, D. C.

February 9, 1944

Memorandum

To: The Industry Divisions, War Production Board
Facilities and Inspection Branch,
Production Division, War Department
The Bureaus of the Navy Department
U. S. Maritime Commission
The Office of War Utilities
The Office of Defense Transportation
The Petroleum Administrator for War
War Foods Administration
Office of the Rubber Director

From: The Facilities Bureau

Deputy Director for Tax Amortization

Attached is a statement designed to be of aid in the preparation of recommendations. It is not intended to be all inclusive. Additional information may, from time to time be requested by members of the staff of the Tax Amortization Branch.

Carman G. Blough, Deputy Director for Tax Amortization Facilities Bureau

[fol. 63] Preparation of Recommendations for Tax Amortization

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would

actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the ad- [fol. 64] vantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essen-

tial to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

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[fol. 65] Exhibit G to Exhibit 6-E

Form GA-141

(7-20-43)

Circular Series Supplement No. 1 to General Program Circular

No. 33

Date: March 8, 1944

United States of America War Production Board

Page 1 of 3

To: All Bureau and Division Directors

Approved: J. A. Krug Program Vice Chairman

Issued through: L. M. Shea Esq. Office of Procedures

Subject: Criteria for Preparation of Recommendations for Necessity Certificates on Form GA-1231

*Section 1 Purpose:*

.01 The purpose of this supplement is to prescribe revised requirements for reports on applications for Necessity Certificates which are hereafter to be incorporated as part of Form GA-1231. These requirements are supplementary to the statement that was attached to memorandum to the Industry Divisions, War Production Board, and other interested Agencies from the Facilities Bureau Deputy Director for Tax Amortization, dated February 9, 1944, and are intended to clarify and expand it, but not to change it in any way. (See Page 3.)

.02 The new data is designed to furnish the information needed to make a decision on an application for a Necessity Certificate in most cases, but additional infor-

mation may, from time to time, appear to the sponsor to be pertinent or be requested by members of the staff of the Tax Amortization Branch.

[fol. 66] *Section 2 Information to be furnished by Sponsoring Agency or Division on Form GA-1231:*

.01 The following information must be supplied before applications for Necessity Certificates will be approved. Sponsoring agencies or industry divisions will be held responsible for the presentation of such data.

1. Is the end product of vital importance to the war effort? ..... If the answer is "Yes", state the basis for such a conclusion.

2. Is there an overall shortage of facilities to produce as against requirements for this product? ..... If so, explain.

3. If there is no overall shortage of facilities, is there an area shortage? ..... If so, state why it is imperative that the applicant increase production facilities rather than have the deficiency made up by another source.

4. Is acquisition or construction by the applicant of each facility listed clearly necessary for production of the end product? ..... Specify all facilities not clearly necessary.

5. Are these facilities wholly or partly a replacement? ..... If so, explain and state what part.

6. Are these facilities to be acquired from an affiliate? .....

7. Would the Government be in a good bargaining position after the War if these facilities should be publicly financed? ..... If not, state why.

8. Are they of a type that are likely to have a reasonable postwar value? ..... If not, state why.

[fol. 67] 9. Is it reasonable to assume that the facilities are of such a type that they may be useful to the applicant after the War? ..... If not, state why.

10. Comments:

11. Recommendations:

A. Based upon the foregoing it is recommended that the application be denied.

Signed .....

(over)

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B. Based on the foregoing it is our opinion that it is to the advantage of the Government that the facilities be privately financed. In addition, recognizing the Government's financial interest in a certified facility, we are of the opinion that the facilities listed in Appendix A are so essential to the progress of the War that the issuance of a certificate up to ... % of cost is recommended.

Signed .....

*Section 3 Effective Date for Required Information:*

.01 The revised requirements for reports on applications for Necessity Certificates given in Section 2 are to be incorporated as a part of Form GA-1231. Whether the new forms are available or not, all reports from Sponsoring Agencies, or Divisions, dated after March 10, 1944, must contain this information or they will be returned without action.

[fol. 68] *Section 4 Instruction for determining Recommendation on Form GA-1231:*

.01 By applying the answers to the questions given in Section 2 and eventually to be included on Form GA-1231, one of the following recommendations should be made:

1. That no certificate should be issued.
2. That the facilities should be partially certified (state specific percentage recommended).
3. That facilities should be certified 100%.

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

3. Partial certificate will be given in appropriate percentages under certain other circumstances [fol. 69] of an extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

b. When a facility is a replacement, but a more expensive facility is required because of special war needs than would be required for normal operations of the Company, a percentage certificate may be issued covering the excess of the cost of the facility over the cost of the type of facility that would have been otherwise required.

c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that

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* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost.

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Attachment to Memorandum, February 9, 1944

## Preparation of Recommendations for Tax Amortization

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. [fol. 70] Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market value may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is will-

ing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a certificate were issued, such per-
[fol. 71] centage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Governments financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

Inquiries should be directed to the Tax Amortization Branch, Facilities Bureau.

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[fol. 72] IN THE TAX COURT OF THE UNITED STATES

Filed March 14, 1955

## Opinion

MURDOCK, *Judge:* The Commissioner determined deficiencies as follows:

| *Year* | *Income tax* | *Excess profits tax* |
|---|---|---|
| 1941 | $32,196.29 | .... |
| 1942 | .... | $1,426.59 |
| 1943 | .... | 2,416,728.13 |
| 1944 | 91,026.81 | 1,032,315.21 |

All facts stipulated by the parties are adopted as findings of fact.

* * * * * * *

[Portion of opinion dealing with other issues omitted]

*War Facility Amortization*

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the [fol. 73] certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124(a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made." Section 124(f)(1) provides that in determining the adjusted basis of an emergency facility

"there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31, 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after December 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

[fol. 74] The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U. S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing is the

language of the Act, or in its legislative history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124(f)(1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning [fol. 75] of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer*, (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U. S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States*, (Ct. Cl., Mar. 1, 1955) — F. Supp. —.

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[Tr. 744] IN THE TAX COURT OF THE UNITED STATES

DECISION—June 17, 1955

The parties filed an agreed computation on June 8, 1955, pursuant to the Court's Opinion filed March 14, 1955. Therefore, it is

Ordered and Decided, that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $36,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits

tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim.

(Signed) J. E. Murdock, Judge.

Entered June 17, 1955

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[fol. 76] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REVIEW—Filed September 14, 1955

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Commissioner of Internal Revenue petitions the United States Court of Appeals for the Second Circuit to review the decision of the Tax Court of the United States, entered herein on June 17, 1955, pursuant to its Opinion filed March 14, 1955 (23 T.C. — No. 123), ordering and deciding "that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $30,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim."

This petition for review is filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review is organized under the laws of the State of New Jersey and has its principal office in New York, New York, and filed its federal income and excess profits tax returns for the taxable years 1941, 1942, 1943 and 1944, the years involved herein, with the Collector of Internal Revenue (now District Director of Internal Revenue) for the Second District of New York, whose office is located at New York, New York, which collection district is within the jurisdiction of the United

[fol. 77] States Court of Appeals for the Second Circuit, wherein this review is sought.

This review involves deficiencies in income tax for the years 1941 and 1944, and deficiencies in excess profits tax for the years 1942, 1943 and 1944.

[Signatures omitted]

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[fol. 78] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, October Term, 1955.

No. 253

Docket No. 23902

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

NATIONAL LEAD COMPANY, Respondent.

OPINION—Feb. 14, 1956

Before: Clark, Chief Judge; Frank and Lumbard, Circuit Judges.

The Commissioner of Internal Revenue petitions for review of a decision of the Tax Court, J. E. Murdock, Judge, 23 T.C. 988, holding that the War Production Board had no authority to issue partial certificates of necessity under § 124 of the Internal Revenue Code of 1939 and that the taxpayer is entitled to amortization of the entire cost of facilities covered by such certificates. Reversed.

[fol. 79] H. Brian Holland, Assistant Attorney General, Lee A. Jackson, Hilbert P. Zarky, Frank E. A. Sander, Attorneys, Department of Justice Washington, D. C., for the petitioner.

Karl Riemer, Washington, D. C. (Pehle, Lesser, Mann, Riemer & Luxford, of counsel on the brief), for the respondent.

Lumbard, Circuit Judge:

This is a petition by the Commissioner for review of a decision by the Tax Court that the taxpayer was entitled to accelerated amortization under § 124 of the Internal Revenue Code of 1939 (as amended) of the entire cost of certain "emergency facilities" constructed during World War II. Section 124(e)(1) provided:

> "As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Section 124(f)(1) provided for the inclusion in the basis of such an emergency facility of:

> "so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period which certification shall be under such regulations as may be pre- [fol. 80] scribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Section 124(f)(3) further provided that:

> "In no event and notwithstanding any of the other provisions of this section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year—(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election * * * to take the amortization deduction, or (ii) before December 1, 1941, whichever is later * * *"

On December 17, 1943 the President transferred the certifying function to the War Production Board. Executive Order 9406, 8 Fed. Reg. 16955. In 1944 the Board issued to the taxpayer certificates that the facilities now in question "are necessary to the national defense during the emergency period, up to 50% [or in some cases 35%] of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof * * *" It appears that these partial certificates were issued pursuant to a policy of the WPB, adopted toward the end of the war, of certifying only that part of the cost of a facility attributable to excess war costs.

In filing its return for 1944 the taxpayer claimed accelerated amortization only for the percentage of the cost which had been certified, taking ordinary depreciation on the rest. When the Commissioner subsequently asserted a deficiency against the taxpayer for the year 1944 based on other grounds, the taxpayer filed a petition with the Tax Court on November 21, 1951, seeking to have that Court review the deficiency. On April 9, 1954 the taxpayer filed an amended petition, claiming for the first [fol. 81] time that the WPB had no authority under the statute to certify only excess war costs, and that it is entitled to amortization of the entire cost of the facilities. The Tax Court accepted this argument.

The question whether the WPB had authority to issue these partial certificates presents as interesting problem of statutory interpretation on which courts have differed. Compare *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, cert. denied, 339 U. S. 904, with *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (Ct. Cl. 1952) and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (Ct. Cl. 1955), cert. denied 350 U. S. 862. We do not reach this question, however, since we conclude that the taxpayer no longer has any right to raise the issue.

The statutory provisions set out above map out a scheme in which the function of determining whether facilities are necessary to the national defense is entrusted solely to the WPB. The determination whether facilities are necessary is within that agency's discretion and is

conclusive so long as the discretion is exercised on the basis of criteria not clearly irrelevant to the statutory purpose. An exercise of the agency's discretion is preliminary to any right to claim accelerated amortization under the Code. The agency's decision ordinarily must take place and be evidenced by a certificate made prior to the time when a tax return for the year in question is filed.

It seems clear that if the WPB had denied a certificate altogether on the ground that the facilities were not necessary to the national defense, there would be no review of that action in any forum. Even if the WPB had refused to exercise its discretion or had based its decision on grounds impermissible under the statute, the failure to issue a certificate could not be challenged in the Tax [fol. 82] Court. That Court could not exercise the discretion committed to the WPB under the statute and would therefore be incapable of correcting that agency's error.

But the taxpayer urges that we do not have that problem here because it was implicit even in the issuance of the partial certificates that the WPB had determined the facilities to be necessary to the national defense. We do not agree. The certificates stated only that the facilities were "necessary to the national defense up to 50% [or 35%] of the cost." This statement did not explicitly say that the facilities were necessary in their entirety. Nor is it implicit in the certificate given that the WPB would have determined the facilities to be necessary if the consequence of that determination had been to allow accelerated amortization of the entire cost. The taxpayer's argument on this point follows that of the Court of Claims in *Wickes Corp.* v. *United States, supra.* The Court there said:

> "The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not 'necessary in the interest of national defense during the emergency period,' would

> have said to itself, 'If we make a true statement it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth.' "

The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable with- [fol. 83] out reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20-21 (1952). The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, D. C. D. C. (1944), aff'd *per curiam sub nom.*, *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir. 1949), cert. denied, 339 U. S. 904, and

the remedy was altogether appropriate. If the petitioner had sought mandamus or appropriate injunctive relief in [fol. 84] the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. Cf. *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507, 512-13 (1953). The language of the Supreme Court in the *Callanan* case is quite pertinent here:

> "The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave." 345 U. S. at 513.

The taxpayer here may well have been denied a certificate altogether if it had challenged the Board's action. Having accepted the certificate it is now bound by its limitations.

The decision of the Tax Court is reversed.

[fol. 85] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

NATIONAL LEAD COMPANY, Respondent.

JUDGMENT—Feb. 14, 1956

Appeal from the Tax Court of the United States

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said the Tax Court of the United States be and it hereby is reversed in accordance with the opinion of this Court.

(S) A. Daniel Fusaro, Clerk.

[fol. 85A-86] Petition for rehearing covering 7 pages filed omitted from this print. It was denied, and nothing more by order.

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[fol. 86] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title Omitted]

ORDER DENYING PETITION FOR REHEARING—March 12, 1956

A petition for a rehearing having been filed herein by counsel for the Respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S) A Daniel Fusaro, Clerk.

[fol. 87-88] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title Omitted]

PER CURIAM ORDER DENYING PETITION FOR REHEARING—March 12, 1956

Petition denied.

C.E.C., I.N.F., J.E.L., C.J.J.

Filed March 12, 1956.

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[fol. 89] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 90] SUPREME COURT OF THE UNITED STATES

[Title Omitted]

ORDER ALLOWING CERTIORARI—Filed June 11, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 923.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.